Filed 6/4/19 P. v. Jimenez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHAD WILLIAMS JIMENEZ, Defendant and Appellant.	B289894 (Los Angeles County Super. Ct. No. BA446047)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed and remanded.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Chad Williams Jimenez guilty of two counts of assault with a firearm (Pen. Code, § 245, subd. (b)[1] [counts 1 & 4]), possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 2]), and attempted second degree robbery (§§ 211/664 [count 5]).[2] The jury found true the allegations that Jimenez committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)–(C)), and that he personally used a firearm in commission of the offenses (§§ 12022.5, subds. (a) & (d), 12022.53, subd. (b)). In a bifurcated proceeding, the trial court found true the allegation that Jimenez had suffered a prior strike conviction. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1).

The trial court sentenced Jimenez to a total of 32 years and 4 months, calculated as follows: in count 1, the mid-term of 6 years, doubled to 12 years under the three strikes law, plus 10 years for the gun enhancement (§ 12022.5), plus a stayed term of 5 years for the gang enhancement (§ 186.22, subd. (b)(1)(B)); in count 4, a consecutive sentence of 2 years,

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The information does not include a count 3.

(one-third the mid-term of 6 years), doubled to 4 years pursuant to the three strikes law, plus 16 months (one-third the mid-term of 4 years) for the gun enhancement (§ 12022.5), plus a stayed term of 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)); in count 2, a concurrent sentence of 2 years, plus 3 years for the gang enhancement (§ 186.22, subd. (b)(1)(A)); in count 5, the mid-term of 2 years, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), plus 10 years for the firearm enhancement (§ 12022.53, subd. (b)), stayed pursuant to section 654; and 5 years for the prior serious felony conviction enhancement (§ 667, subd. (a)(1)).

Jimenez argues that: (1) the trial court erred in admitting a statement he made while in custody in violation of his *Miranda*[3] rights; (2) the prosecutor committed *Griffin*[4] error by commenting on Jimenez's failure to testify; (3) the prosecutor committed prosecutorial misconduct by shifting the burden of proof to Jimenez; (4) the prosecution violated Jimenez's right to due process by failing to examine the weapon allegedly used in the crimes for DNA evidence; (5) Jimenez was prejudiced by cumulative error; (6) Jimenez is

---

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[4] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

entitled to remand for the trial court to rule on his *Romero*[5] motion; (7) Jimenez is entitled to remand for the trial court to determine whether to exercise its discretion to strike the five-year prior serious felony conviction enhancement under section 667, subdivision (a)(1); and (8) the trial court's imposition of assessments under Government Code section 70373 and section 1465.8, subdivision (a)(1), and a restitution fine under section 1202.4, subdivision (b), was unconstitutional because the court failed to make a determination that he had the ability to pay the assessments and fine.

We remand the matter for the limited purpose of allowing the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under section 667, subdivision (a)(1), but otherwise affirm the judgment.

FACTS

Prosecution

First Assault

On April 20, 2016, at approximately 5:15 p.m., Fredy Gonzalez was driving home in his truck on Elm Street, with

---

[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

his window down. Gonzalez stopped at the stop sign at the intersection of Elm Street and Cypress Avenue behind another car. He felt something being pressed against the ribs on the left side of his body. When Gonzalez turned to look left, a man whom he later identified as Jimenez asked him, "Where you from?" and called him a "motherfucker." Gonzalez told Jimenez that he did not speak English and that he was from Mexico. Jimenez responded, "Oh, so you're a Paisa [a Mexican from Mexico]." Jimenez told Gonzalez that he was "from Cypress." Gonzalez saw the object pressing into him was a small, black, semiautomatic gun. Jimenez stepped down from the truck's running board, walked around to the passenger side of the truck, and told Gonzalez to park and wait for him. Gonzalez parked. Jimenez did not approach him again. He put the gun in his waistband and walked toward Cypress Avenue. The entire exchange between Jimenez and Gonzalez lasted about two minutes.

Prior to Jimenez approaching the car, Gonzalez saw him standing with another man who had a small dog on Asbury Street nearby. Jimenez was wearing jeans and a white T-shirt, and had tattoos on his chest. Gonzalez did not recall Jimenez wearing a baseball cap.

Gonzalez did not report the incident that night because he was afraid. He went to the police station and reported the crime the next day. About a week after Gonzalez made the report, investigating officer Los Angeles Police Department Detective Juan Aguilar visited him at work and asked him to

look at a six-pack photo line-up and let him know if any of the men was the person who assaulted him. Gonzalez identified Jimenez as the perpetrator. Gonzalez twice identified Jimenez again as the man who assaulted him, at the preliminary hearing and at trial. The prosecutor showed Gonzalez a photograph taken of Jimenez when he was arrested and asked if that was how the person who assaulted him was dressed. He responded that it was. Gonzalez estimated that Jimenez was 1.8 meters tall.[6]

Second Assault

Approximately 15 minutes after the incident involving Gonzalez, at around 5:30 p.m., Ricardo Guardado stopped his vehicle at a traffic light at the intersection of Future Street and Cypress Avenue, about one block away from the location where the first incident took place. Guardado had his windows rolled down. In his rearview mirror, Guardado saw a man whom he later identified as Jimenez start running toward Guardado's car on the right side of the street. Guardado was several cars back from the light and there were more cars behind him. Jimenez ran up to Guardado's car and banged hard on the passenger door. Jimenez leaned through the passenger window and pointed a gun to Guardado's head. He repeatedly asked Guardado which gang he was from. Guardado told Jimenez he was not

[6] The parties stipulated that 1.8 meters is approximately 5 feet, 10.8 inches.

a "Cholo" and did not belong to a gang. Jimenez demanded Guardado's wallet. Guardado told Jimenez he did not have it with him, and Jimenez left. The incident lasted approximately one minute.

Guardado started to drive away, but returned when he saw officers. He spoke with police between 5 and 10 minutes after the incident took place. Officers took him to look at several suspects who had been detained within an approximately one block radius of the crime scene. Guardado identified Jimenez as the perpetrator, approximately 10 minutes after the incident occurred. None of the other people who the police showed him were involved in the crimes. Jimenez was wearing blue pants, a white muscle shirt, and a hat when he assaulted Guardado. He also had tattoos on his chest. Guardado could not see any hair when Jimenez was assaulting him, because he had a cap on. Jimenez was wearing the same clothing when Guardado identified him, except that he was no longer wearing the hat.

At trial, Guardado identified Jimenez as the man who assaulted and tried to rob him. Guardado also explained his prior testimony at the preliminary hearing; there, Guardado first stated that he wasn't sure Jimenez was the person who assaulted him because he was frightened that Jimenez was a gang member, but ultimately he knew that he had to tell the truth and he identified Jimenez.

Greg Kozaki witnessed the assault on Guardado as he was approaching the intersection of Future Street and

Cypress Avenue. Kozaki saw a man run along the sidewalk and then suddenly cut onto Cypress Avenue. He was dressed in a white shirt, dark blue pants and a dark blue cap. He was approximately 5 feet, 10 inches tall. There was a second man who was also running about 20 to 30 yards behind the first man, but the second man was not running as quickly. The second man was wearing dark clothing and had a small dog with him. He was not carrying a firearm and did not interact with any of the motorists. The first man approached a stopped vehicle in front of Kozaki's car from the passenger side of the vehicle. The man reached for something and cocked his arm back. Kozaki's immediate impression was that the man was reaching for a gun. The object the man was holding was "something that had a very straight dark quality to it that appeared to be longer than [Kozaki's] hand." The man was speaking to someone in the vehicle in an "aggressive" manner. Kozaki put his car in reverse to get away from the area. He was only able to back up a little because there was a car behind him, so he drove forward and veered around the perpetrator. Once he passed the intersection, Kozaki called 911 to report the crime.

An audio recording of the call was played for the jury. In the call Kozaki told the 911 operator that the perpetrator was a Hispanic male, wearing a white tank top, blue jeans, and a blue baseball cap like a Dodger's cap. Kozaki also reported "there appeared to be another individual with him, but maybe about 20 or 30 yards south of him," who was

wearing dark clothing and had a small dog like a Chihuahua with him.

Later that evening, officers brought Kozaki back to the crime scene to see if he could identify the perpetrator. Kozaki could not identify anyone because he never saw the gunman's face.

Investigation

At approximately 5:40 p.m., Los Angeles Police Department Officer Leonardo Serrato and his partner responded to the radio call. Officer Serrato called for a helicopter to provide support. The officers detained Juan Zambrano, who matched the description of the second man with the small dog who Kozaki had seen. Zambrano was compliant, and they detained him without incident. Zambrano did not have a firearm in his possession. The officers took Zambrano's information, and prepared a field investigation card on him. Officers brought witnesses to Zambrano's location for possible identification, but no one identified him as a perpetrator. The officers determined that Zambrano had not been involved in the crimes and released him.

Los Angeles Police Department Officer Jamie Delieuze, the technical flight officer riding in the helicopter dispatched to the area, spotted a suspect fleeing from the police who fit the description Kozaki had given the 911 operator. The man was running from an alley onto Cypress Avenue. Officer

Delieuze relayed the information to other officers over the police radio.

Los Angeles Police Department Officer Araum Bennefield and his partner also responded to the scene. When they arrived, they saw Jimenez running along Future Street. They pursued Jimenez and arrested him at the intersection of Future Street and Cypress Avenue. After Jimenez was detained, he complained of hand pain. The officers called an ambulance and transported him to a hospital for medical evaluation. Officer Bennefield testified that Jimenez told him "'My family members held down the turf for years,'" in response to a question the officer asked.

J. Reyes, who lived in a rear house on Future Street, told officers that he saw a Hispanic male in a white T-shirt jump into his backyard.[7] The man stopped near a pile of metal for about 30 seconds before jumping over a fence into the alley behind the houses. Los Angeles Police Department Officer Christopher Amador responded to the scene with a police dog that was trained to detect guns. The dog signaled that it had discovered a firearm at the edge of a pile of junk metal in Reyes's backyard on Future Street. Officer Serrato collected the firearm, which was a Smith and Wesson semiautomatic 9mm handgun. The gun was loaded, with a round inside the chamber ready to fire and an additional nine rounds in the magazine.

---

[7] The parties stipulated to Reyes's testimony.

The recovered gun was tested for fingerprints by Los Angeles Police Department forensic specialist Larklyn Watts. Partial latent prints were lifted from the gun, but none were usable. The gun was not tested for DNA evidence.

Gang Evidence

At trial, Los Angeles Police Department Officer Jose Tejeda, who works in a specialized unit doing gang enforcement detail primarily monitoring the Cypress Park Gang, testified that Jimenez was a self-identified member of the Cypress Park Gang. Officer Tejeda had multiple consensual contacts with Jimenez. Jimenez had told him that "he's been the [*sic*] gang member for the Cypress Park Gang primarily his whole life. He told me that he has family in the Cypress Park Gang. So pretty much growing up is almost as [*sic*] he knew he was going to be part of it." Officer Tejeda testified regarding the history, territory, and symbols and clothing worn by members of the Cypress Park Gang. Officer Tejeda rendered his expert opinion that, given a hypothetical situation mirroring this case, the assaults with a deadly weapon and the attempted robbery were committed for the benefit of the gang. Officer Tejeda was also familiar with Zambrano, knew Zambrano had a small dog, and had seen Jimenez and Zambrano together on one prior occasion, although the officer did not stop to interact with them.

Detective Aguilar was the investigating officer in Jimenez's case. He met Jimenez in 2007, while he was a

gang officer in the Northeast Division. Jimenez told Detective Aguilar that he was a member of the Cypress Park gang.

Defense

Los Angeles Police Department Officer Hector Olivera testified that he took the initial crime report from Gonzalez. Gonzalez stated Jimenez was approximately five feet, nine inches tall.

The parties stipulated that Jimenez was six feet and one-half inch tall. The parties also stipulated that that Jimenez's aunt, Patricia Alfaro, whom defense counsel identified in the audience during her cross-examination of Officer Tejeda, lived on Isabel Street near the crime scenes in April of 2016.

DISCUSSION

Miranda Violation

Jimenez contends that the trial court erred by admitting his statement to Officer Bennefield that "'My family members held down the turf for years,'" which the officer testified Jimenez made in response to a question he asked.[8] Jimenez argues that when he made the statement

[8] In the opening brief, Jimenez objects to the statement that "'His family had been putting in work and held down

he had been arrested and handcuffed and was waiting in the hospital in the officer's custody, but had not been given *Miranda* warnings. Jimenez argues that counsel objected to the statement's admission at trial, but that in the event that we determine she did not object, her failure amounts to ineffective assistance of counsel.

The record does not support Jimenez's assertion that counsel properly objected to admission of Jimenez's statement about his family. Counsel argued that she should be permitted to elicit testimony with respect to a different but allegedly related statement. We agree with the Attorney General that Jimenez's failure to raise a *Miranda* objection at trial forfeits the claim on appeal. (*People v. Mattson* (1990) 50 Cal.3d 826, 854, quoting *People v. Milner* (1988) 45 Cal.3d 227, 236 ["'a defendant must make a specific objection on *Miranda* grounds at the trial level in order to raise a *Miranda* claim on appeal'"].) However, because Jimenez argues that his trial counsel was ineffective for failing to raise a *Miranda* objection, we address the claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish his attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Where

---

the turf for years.'" However, at trial Officer Bennefield clarified in testimony that the actual statement Jimenez made was "'My family members held down the turf for years.'"

the defendant has failed to demonstrate prejudice, we need not determine whether counsel's performance was objectively deficient. (*Id*. at p. 697.) To demonstrate prejudice, the defendant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.)

It is not clear from the record that Jimenez had not been *Mirandized* when he made the statement in the hospital. Defense counsel asked Officer Bennefield, "Did you read [Jimenez] his *Miranda* rights at any point?" The officer responded, "I did not." This testimony establishes that Officer Bennefield never read Jimenez his rights. It does not establish that Jimenez was not *Mirandized* by one of the officers present at the scene in the approximately 30 to 40 minutes that elapsed after he was arrested but before the ambulance arrived to transport him to the hospital. As Officer Bennefield later explained, he was part of an "additional unit," and "[t]he primary unit . . . is the unit that writes the reports, and they're pretty much making the arrest. It's their investigation."

Even if Jimenez had not been read his rights when he made the statement, it is not reasonably probable that the outcome of the trial would have been more favorable to Jimenez if his counsel had objected, because the evidence was cumulative. Officer Tejeda testified that he had

multiple consensual contacts with Jimenez, and Jimenez had told him that "he's been the [*sic*] gang member for the Cypress Park Gang primarily his whole life. He told me that he has family in the Cypress Park Gang. So pretty much growing up is almost as [*sic*] he knew he was going to be part of it." The jury received the same information from the same source—in both instances Jimenez himself informed an officer that he had family members who had been gang members for a significant period of time. The statement that Jimenez made in the hospital is no more damaging than the statement he made to Officer Tejeda and likely had little, if any, impact on the jury's verdict. Because he has not established prejudice, Jimenez's ineffective assistance of counsel claim fails.[9]

Prosecutorial Misconduct in Closing Argument

In his rebuttal closing argument, the prosecutor admonished the jury: "The burden in this case is on the

---

[9] Because we resolve this issue based on the failure to show prejudice, we need not reach the issue of whether counsel's performance was deficient for failing to object to the statement based on *Miranda*. We note, however, that counsel argued that the statement, phrased in the past tense (i.e., "My family *held* the turf for years." (emphasis added)), reflects Jimenez was not involved in the gang at the time of the charged conduct. It appears counsel had a "plausible strategic reason" for not objecting to the evidence. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1080.)

People of the State of California, the people I represent. I have to prove the case to you beyond a reasonable doubt."

Soon afterward, he argued:

"But who you didn't hear from is Juan Zambrano, someone that we know the defendant is friends with. He's had past contact with the gang officer, had past contact with the defendant . . . . We know he was there the day of the incident. We know he was not identified as a suspect. So he would not have anything to hide. [¶] So had Mr. Zambrano, who was with the defendant that day, seen a third person who looked just like the defendant commit these crimes, you would have heard from him by the defense."

Defense counsel objected to the statement, and the trial court overruled the objection, stating "No. 1, the defense doesn't have to prove anything. No. 2, it is fair for the prosecutor to comment on the failure of the defense to call logical witnesses."

At sidebar, the trial court discussed the matter further with the parties:

"The Court: . . . [¶] [Defense counsel], [the prosecutor] was talking about a witness, not the defense.

"[Defense Counsel]: Yes. I think that's assuming -- the implication is the defense knows where Mr. -- knows how to contact or knows where Mr. Zambrano is. So it's not as if I'm not calling Mr. -- Mr. Jimenez's wife or something to that effect. So I think it's a little far-reaching in this instance.

"The Court: Okay. [¶] [Prosecutor].

"[Prosecutor]: I'd submit there's ample case law, 'People v. Brady,' [(2010)] 50 Cal. 4th 547 [(*Brady*)], that says these type of arguments are acceptable.

"The Court: The objection is overruled."

The prosecutor continued his closing remarks:

"It would have been logical for the defense to [call] Mr. Zambrano -- had Mr. Zambrano been able to provide any real evidence that the defendant either didn't commit the crime or was not in the area. It would have been logical for the defendant's aunt to testify.

"Now, in the stipulation, the person who was seated in court on that day was the defendant's aunt. The defendant's aunt could have said he was home that day. Could have said 'You know what? He was gainfully employed. He went to work that day wearing a uniform.' You did not hear that.[10]

"And you know that the firearm in this case was in evidence from the day it was taken to the day it came into court, and the defense never tested that firearm. What does that tell you? Of course the burden is on us as it should be. But in testing the argument of the defense, you can use the same commonsense and logic you would apply to any argument."

Later, the court gave the parties another opportunity to put their arguments on record. Defense counsel stated:

---

[10] Jimenez's counsel had argued in closing, based upon the fact that Jimenez's aunt lived nearby, Jimenez was likely walking toward the location where the assaults had taken place, not running away from the scene of the crimes.

"My objection was that in this case it's not as if I'm calling -- not calling Mr. Jimenez's wife or something to that effect. The implication is that the defense knows where Mr. Zambrano is, which I do not, and I realize he's a suspect that's stopped out there, but I don't think the evidence came in that they were friends.[11] So, anyway, I thought it was a little far-reaching. [¶] I realize the prosecution can comment on logical witnesses for the defense to call, but I think in this case it was over-reaching."

The prosecutor reiterated that the argument was proper under *Brady*, *supra*, 50 Cal. 4th at p. 566. He noted that commenting on a defendant's failure to call his spouse as a witness, as in the defense's example, would not have been proper because of spousal privilege, but that he knew of no privilege that Zambrano could assert.

Jimenez makes two interrelated arguments that the above remarks constituted prosecutorial misconduct, which we discuss in turn.

Legal Principles

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or

---

[11] Jimenez does not challenge the prosecutor's comment that he and Zambrano were "friends" on appeal. We note that the prosecutor expressly argued that they were friends based on the testimony of Officer Tejeda, who had previously seen Jimenez and Zambrano together.

reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' . . . [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

"Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Griffin Error

Jimenez first argues that he was deprived of his Fifth and Fourteenth Amendment rights to be free from improper self-incrimination under *Griffin*, *supra*, 380 U.S. 609, because the prosecutor repeatedly commented on his failure to present alibi evidence in closing argument. The Attorney General argues, and we agree, that Jimenez failed to preserve the claim for appeal because at trial defense

counsel did not object on the specific ground Jimenez now raises on appeal. Regardless, the claim lacks merit.

"'[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.' (*Griffin*[, *supra*,] 380 U.S. [at p.] 615.) The prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1266.) The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1304.)" (*People v. Brady*, *supra*, 50 Cal.4th at pp. 565–566.) A comment that the defense has failed to present exculpatory evidence does not ordinarily violate *Griffin*. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257 (*Lewis*).)

We agree with the Attorney General that Jimenez failed to preserve his claim because defense counsel did not argue that the prosecutor impermissibly commented on his failure to testify under *Griffin*, *supra*, 380 U.S. 609, in the trial court. (*People v. Turner* (2004) 34 Cal.4th 406, 421 [*Griffin* error forfeited for failure to object].) "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Counsel objected on the ground that the comments implied she knew where to find the witness. She did not argue that the

comments implicated Jimenez's right to remain silent. To the contrary, defense counsel appears to have conceded that there was no *Griffin* error. At sidebar, the court stated that it interpreted the prosecutor's comments to be "about a witness, not the defense." Defense counsel responded "yes," and argued that "the implication is the defense knows where Mr. -- knows how to contact or knows where Mr. Zambrano is." Later, defense counsel acknowledged that the prosecutor could comment on the defense's failure to call logical witnesses, but that she felt the prosecutor was "over-reaching" in this instance.

Regardless, the claim lacks merit. In this case, the prosecutor highlighted the defense's failure to "introduce material evidence [and] call logical witnesses." (*Brady*, *supra*, 50 Cal.4th at p. 566.) The prosecutor named two witnesses that the defense could have been reasonably expected to call and explained why it would be logical to call them. Zambrano had been seen with Jimenez in the past, and witnesses had seen him next to and/or close behind the suspect when the crimes occurred. He was never a suspect, and he was therefore in a position to be helpful to Jimenez if he had observed anything that would exonerate him. Zambrano could have testified regarding Jimenez's whereabouts when the crimes occurred or testified that another person was present and committed the crimes, as defense counsel argued.[12]

---

[12] Although defense counsel stated she did not know where Zambrano was, she did not argue that she had

With respect to Jimenez's aunt, it had been stipulated that Alfaro lived nearby. Defense counsel argued in closing that Jimenez may have been walking toward the crime scene from his aunt's house, as opposed to running away, as the prosecution alleged. Defense counsel also alluded that Jimenez may have been coming from or going to work as a firefighter in the San Dimas area, which is something his aunt was likely to have known if he had, in fact, been at her house. Alfaro attended his trial and was presumably available. It would have been logical to call her to testify to his whereabouts and to provide additional support for counsel's closing arguments.

Nothing the prosecutor said insinuated that Jimenez should have testified or indicated that Jimenez was guilty because he chose not to testify. The prosecutor emphasized that although he bore the burden of proof, the jury could take Jimenez's failure to present exculpatory evidence that logically should have been available into account when considering the defense's argument. It is not reasonably probable that the jury would have construed the prosecutor's remarks as comments on Jimenez's exercise of his right not to testify or penalized him for exercising that right. On this record, we cannot conclude that the prosecutor committed error under *Griffin*.

---

attempted to find him and was unable to, or argue that the prosecutor was unfairly commenting that she failed to produce an unavailable witness.

Burden of Proving Witnesses are Available and Will Provide Favorable Testimony

Jimenez next argues that the prosecutor's comments impermissibly shifted the burden of proof by implying that Zambrano and his aunt were available witnesses whose testimony would naturally be expected to be favorable to him. He contends that the prosecution was required to establish their availability and to establish that Zambrano and Alfaro could be expected to offer testimony that was favorable to Jimenez, which it failed to do. We reject these arguments as well.

Ordinarily, a prosecutor's comment that the defense failed to present exculpatory evidence does not erroneously imply that the defendant bears the burden of proof. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340 (*Bradford*); *Lewis*, *supra*, 117 Cal.App.4th at p. 257.) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*Bradford*, *supra*, at p. 1340.)

Jimenez relies on the Supreme Court's opinions in *People v. Ford* (1988) 45 Cal.3d 431 (*Ford*) and *People v. Stankewitz* (1990) 51 Cal.3d 72 (*Stankewitz*), in support of his argument that the burden is on the People to establish a witnesses' availability before commenting on the defense's failure to call a witness. Jimenez's reliance is misplaced.

In *Ford*, the defendant testified that he was not at the crime scene at the time the crime was committed, but in the company of co-defendants Cooper and Elder at Cooper's home. (*Ford*, *supra*, 45 Cal.3d at p. 438.) In closing, the prosecutor commented: "'One other thing I would submit to you that it's very convenient that the defendant cannot recall being on Springfield Street on April the 11th. He certainly can't tell you that he was there casing the area. There is just one other point that I would like to make, and that is that if the testimony is indeed true, why didn't he bring in Mr. Cooper, Mr. Elder?'" (*Ibid.*) On appeal, the defendant claimed prosecutorial misconduct, based on his assertion that his co-defendants were unavailable. The Supreme Court held that the comments were permissible, because although the co-defendants *could* have asserted privilege against self-incrimination, they had not done so, their whereabouts were known, and they were subject to subpoena—"[t]hey were, therefore, literally 'available.'" (*Id.* at p. 440.)

In *Stankewitz*, the prosecutor called only one of four witnesses to a murder. In closing argument, defense counsel commented: "'And I think that the fact that those people are absent when they are available is something that you should give great consideration to.'" (*Stankewitz*, *supra*, 51 Cal.3d at p. 102.) The prosecutor objected because there was no evidence to indicate the witnesses were available. The trial court sustained the objection, and the Supreme Court affirmed on the basis that nothing in the record suggested

that the witnesses were available, and "[i]t is axiomatic that counsel may not state or assume facts in argument that are not in evidence." (*Ibid.*) The *Stankewitz* court distinguished *Ford*: "There, we held that a codefendant who has not actually exercised his privilege against self-incrimination is not unavailable and therefore the prosecutor did not err in commenting on defendant's failure to call several codefendants who might have substantiated his alibi defense. *Ford* does not, however, permit the prosecutor or defense counsel to state as a fact that a codefendant is available as a witness when there is no evidence to substantiate the statement." (*Ibid.*)

Stankewitz and *Ford* stand for the long-established proposition that a party is prohibited from asserting facts that are not supported by the evidence. Neither case holds that a party who argues that an opposing party failed to call a logical witness has the burden of demonstrating the witness is available or that the witness would be expected to provide favorable testimony. To the contrary, *Ford* held that "inviting the jury to draw a logical inference based on the state of the evidence, including comment on the failure to call available witnesses, is permissible except as limited by [Evidence Code] section 913 and *Griffin v. California*, *supra*, 380 U.S. 609." (*Ford*, *supra*, 45 Cal.3d at p. 449.) Neither of these limitations relate to a witness's availability or to the likelihood that the witness will provide evidence favorable to

the opposing party.[13] The determination of whether "the circumstances of the case are such that comment is not permissible" is within the discretion of the trial court. (*Ford*, *supra*, 45 Cal.3d at p. 447.)

In this case, the trial court did not abuse its discretion. There was no assertion that either witness was unavailable. Defense counsel said she did not know where Zambrano was, but she did not indicate whether she had attempted to find him or had some other reason to believe he was legally unavailable. Alfaro was present in the audience and spoke at Jimenez's sentencing hearing. Defense counsel did not object to the implication that she was an available witness.

Jimenez presented evidence to introduce doubt regarding the identity of the perpetrator. Defense counsel argued that Jimenez, although in the area at the time, did not commit the crimes. The logical implication of this argument is that he was not the person who was seen standing next to Zambrano or running just ahead of him. Officer Tejeda testified that he had observed Zambrano and Jimenez together on another occasion—the logical inference to be drawn is that Jimenez and Zambrano knew each other and that Zambrano could identify Jimenez. There was therefore reason to believe that if, as Jimenez claimed, he did not commit the crimes, Zambrano would know that

---

[13] *Griffin*, as discussed, *ante*, prohibits comment on the defendant's exercise of the right not to testify. Evidence Code 913 prohibits comment on a witness's exercise of the right not to testify.

Jimenez did not commit them and could testify that the perpetrator, who was with him just before the crimes and nearby afterward, was not Jimenez.

Defense counsel also suggested that Jimenez may have been in the neighborhood visiting his aunt. Alfaro was present at trial, but the defense did not call her to testify. Instead, counsel attempted to introduce Alfaro's address and her relationship to Jimenez into the record through cross-examination of Detective Aguilar and Officer Tejeda, neither of whom was familiar with Jimenez's aunt or knew Jimenez had a relative in the area where the crimes were committed. Eventually, the parties stipulated that Alfaro, who defense counsel had previously pointed out to the jury, was Jimenez's aunt and lived near the crime scenes. If Jimenez had been visiting Alfaro that day, she could testify to that effect, and it would be logical for her to do so. In light of Jimenez's defense and other facts elicited at trial, both Zambrano and Alfaro were logical witnesses, who presumably could have offered favorable testimony.

Moreover, the prosecutor reminded the jury both before and after these comments that the People bore the burden of proof. Under the circumstances, there is not a reasonable likelihood that the jury understood the prosecutor's comments to mean that Jimenez bore the burden of proof or applied them in such a way as to shift the burden to Jimenez, rather than interpreting them to mean that Jimenez did not call witnesses who would logically have

been expected to aid his defense. (See *Lewis*, *supra*, 117 Cal.App.4th at p. 257.)

Failure to Examine the Gun for DNA Evidence

Jimenez claims the prosecution violated his right to due process by failing to test the weapon alleged to have been used to commit the crimes for DNA evidence. We agree with the Attorney General that Jimenez's failure to raise this objection at trial bars him from doing so on appeal. (*People v. Beeler* (1995) 9 Cal.4th 953, 975 (*Beeler*) [counsel's failure to object to alleged shortcomings in rifle testing forfeited challenge on appeal].) Regardless, the claim lacks merit, and Jimenez suffered no prejudice.

Prior to trial, defense counsel moved to have the gun excluded on the basis that there was insufficient evidence to tie it to Jimenez or the crime. The trial court denied the motion because the gun was similar to the one witnesses described, and there was circumstantial evidence that Jimenez "did what the witnesses say he did." The question was one of weight rather than admissibility, and weight was for the jury to decide. Counsel did not argue that the police acted in bad faith when they chose not to test the gun for DNA or that Jimenez was prejudiced by the decision not to test for DNA in light of the lack of other evidence tying the gun to Jimenez. The challenge is forfeited. (*Beeler*, *supra*, 9 Cal.4th at p. 975.)

Jimenez argues that even if counsel did not object at trial, we should review the claim on the merits because (1) it presents a purely legal issue based on undisputed facts; (2) an objection would have been futile because the objection was not supported by the law at the time of trial; and (3) it presents an important constitutional issue that has not been addressed by the California courts or the United States Supreme Court. We disagree.

Contrary to Jimenez's assertion, both the United States Supreme Court and the California courts have held that the police are under no obligation to conduct specific tests, even when a test may be exculpatory. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 58–59 (*Youngblood*) ["the police do not have a constitutional duty to perform any particular tests" although the tests "might have been exculpatory"]; *People v. Seaton* (2001) 26 Cal.4th 598, 656–657 (*Seaton*) [same]; *Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 143 [defendant has no right to have police conduct testing of DNA evidence, let alone right to speedy testing]; *People v. Ventura* (1985) 174 Cal.App.3d 784, 794–795 [no duty to test evidence absent a request by defendant]; *People v. Newsome* (1982) 136 Cal.App.3d 992, 1006 [same].) Jimenez offers no basis for his belief that objection would have been futile. The trial court heard and considered the party's arguments regarding whether the gun should be admitted both before and during trial, and made a reasoned ruling. Nothing indicates that it would not have given the same consideration to the argument that the police

should have conducted DNA testing. Jimenez is correct that the objection was not supported by law at the time of trial, but this is not a case in which the law has changed or there is an issue of first impression that would justify review. Finally, this is not a pure question of law. The facts relevant to whether the police had some obligation to test the gun for DNA evidence are disputed. Jimenez's argument that DNA testing was required is based on his view of the evidence, which was vigorously disputed at trial.

Even if we were to consider the claim on the merits, it would fail. As we have discussed, both the United States Supreme Court and the California courts have held that there is no obligation for the police to do specific testing. (*Youngblood*, *supra*, 488 U.S. at pp. 58–59; *Seaton supra*, 26 Cal.4th at pp. 656–657.) Officers may not "see that evidence is likely to be exculpatory but avoid collecting it because of that perception," but there is no evidence that was the case here. (See *People v. Velasco* (2011) 194 Cal.App.4th 1258, 1265 [officers act in bad faith when they fail to collect evidence that they perceive as exculpatory].) Jimenez was identified by both victims as the man who pointed a gun at them. A 911 caller confirmed that Jimenez's clothing matched that of the person that he saw committing one of the crimes, and another witness saw a man whose clothing and description matched Jimenez go into his back yard, stop momentarily near a pile of metal, and then hop over the fence. The police found the gun in the metal pile, and apprehended Jimenez nearby. Given the nature and

strength of the evidence of Jimenez's connection to the crimes and the gun, there is no reason to believe that DNA evidence would have been exculpatory or that the police would have believed it to be.

Moreover, there was nothing to prevent Jimenez from requesting that the gun be tested if he believed the evidence would have been favorable to him. Detective Aguilar testified that he will submit a weapon for DNA testing on the request of either the defense or the prosecution, and that the defense had not requested to have the gun tested. There is no indication that the evidence wasn't properly preserved for testing. Forensic print specialist Watts testified that DNA testing usually occurs after fingerprint testing and can be completed after the method of fingerprint testing used in this case has been performed.

Finally, Jimenez used the fact that the weapon was not tested for DNA to his benefit throughout trial. In her opening statement, defense counsel told the jury, "There will be no DNA evidence connected to this firearm." When questioning Detective Aguilar, she asked if he could have submitted the gun for DNA testing on his own or on the prosecution's request, and elicited that he could have done so, but opted not to. In closing argument, she reminded the jury of both the burden of proof and Detective Aguilar's testimony that he had not had the gun tested, which she characterized as "defensive," suggesting that the officer should have ordered the testing, and bringing into question

whether the DNA evidence would have been favorable to the prosecution.

Cumulative Error

Jimenez contends that he was prejudiced by the cumulative errors at trial, which compounded the errors in identification and lack of physical evidence.[14] As we have found no error, there can be no cumulative error.

Romero Motion

Jimenez contends that the trial court erred by failing to rule on his motion to strike his prior conviction in the interests of justice under *Romero*, *supra*, 13 Cal.4th 497. We find no support for this assertion.

At sentencing, the trial court stated:

"I think that -- well, first of all, I think that's in the interest of justice in the scene that's been created. These are gang crimes with guns. I read [the sentencing memoranda].[15] I listened. It's very, very sad, as I told counsel in chambers, that we're now sending you, Mr.

---

[14] Jimenez does not argue that the evidence was insufficient to support his convictions on appeal.

[15] Jimenez's Romero motion was contained in his sentencing memorandum.

Jimenez to the only place where you really succeed. You'll go to fire camp. Do a great job.

"Sadly, you're going to be there for a long, long time. But the other tragedy is is [*sic*] that you did pretty well for a short time when you were out, and maybe this is a relapse, but it's two gang robberies with guns. As I also said to counsel in chambers, we were one pull of the trigger away from a murder case. The law for these kinds of crimes is that you have a strike which I declined the strike. I know I can strike it, but it's very recent. The strike conviction is from 2007.

"Although it's now 11 years from now [*sic*], [Jimenez is] only two years removed from getting out of prison on that case, and then he committed these offenses. Guns were involved -- or a gun was involved in each of these crimes committed on the same street within about 20 minutes of each other.

"There were statements of gang affiliation made at each of these crimes. One of these victims had a gun pointed in his ribs according to the testimony and one at his head."

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) "[A]n abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Id.* at p. 378.)

The record demonstrates that the trial court understood its discretion, stated the factors that led to its decision, and denied Jimenez's motion. The court stated its belief that it was imposing a long sentence "in the interests of justice." It based its decision on the manner in which the crimes were committed, and the fact that the crimes were gang-related, Jimenez's prior strike was recent, and Jimenez had established that even after making what appeared to be progress in his life, he reverted to criminal conduct shortly after being released from prison. The contention is without merit.

Prior Serious Felony Enhancement

Senate Bill No. 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) §§ 1, 2.) The new law took effect on January 1, 2019. We agree with the parties that the law applies to Jimenez, whose appeal was not final on the law's effective date. Accordingly, we remand the matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

Ability to Pay Fines, Fees, and Assessments

At sentencing, the trial court imposed $120 in court facilities assessments (Gov. Code, § 70373), $160 in court operations assessments (§ 1465.8, subd. (a)(1)), a $300 restitution fine (§ 1202.4, subd. (b)), a stayed $300 parole revocation fine (§ 1202.45, subd. (a)), and $2,850 in victim restitution (§ 1202.4, subd. (f)). Jimenez did not request a hearing to determine whether he had the ability to pay these fines, fees, and assessments.

Jimenez asserts that he is indigent, as evidenced by the fact that he was represented by a court-appointed attorney at trial and on appeal. He argues that the trial court's failure to determine whether he had the ability to pay the assessments and fines prior to their imposition violated his constitutional rights to due process and equal protection under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which applies to his case retroactively. Jimenez argues that counsel's failure to object did not forfeit his claims, and requests that we strike the court operations and court facilities assessments, and stay execution of the restitution fine unless and until the People prove that he has the present ability to pay the fine, as the Court of Appeal in *Dueñas* did.

We reject Jimenez's contention.[16] In *Dueñas*, the record established that the defendant was a homeless,

---

[16] Because we resolve Jimenez's claim on the merits, we need not address the issues of whether Jimenez forfeited

jobless mother of two children, whose husband was also frequently unemployed. Dueñas was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. Dueñas had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. In the matter before the Court of Appeal, Dueñas had requested, and the trial court had granted, a hearing to determine her ability to pay a $30 court facilities assessment (Gov. Code, § 70373), a $40 court operations assessment (§ 1465.8, subd. (a)(1)), and a $150 restitution fine (§ 1202.4, subd. (b)), as well as previously imposed attorney fees.[17] (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas presented undisputed evidence of her inability to pay, and the trial court waived the attorney fees. However, the court was statutorily required to impose the court facilities assessment and court operations assessment, and prohibited from considering her inability to pay as a "'compelling and extraordinary reason[]'" that would permit waiver of the minimum restitution fine. (*Id.* at p. 1163.) It therefore imposed the assessments and fine

---

his claim or whether Dueñas applies retroactively to cases that are not yet final.

[17] A $150 restitution fine is the minimum that may be imposed upon a misdemeanant. (§ 1202.4, subd. (b).)

despite its finding that Dueñas was unable to pay them. (*Ibid*.)

The Court of Appeal held that the consequences Dueñas faced amounted to punishment on the basis of poverty, which the state and federal constitutional rights to due process and equal protection forbid. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166–1172.) The court's decision was rooted in the well-established constitutional principles that "'allow no invidious discriminations between persons and different groups of persons'" and prohibit "inflict[ing] punishment on indigent convicted criminal defendants solely on the basis of their poverty." (*Id*. at p. 1166.) Specifically, the Court of Appeal stated: "'As legislative and other policymakers are becoming increasingly aware, the growing use of . . . fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant's commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation. "What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large. . . . [¶] . . . Debt-related mandatory court appearances and probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtor's prison. . . . Aggressive collection tactics can disrupt employment, make

it difficult to meet other obligations such as child support, and lead to financial insecurity—all of which can lead to recidivism." [Citations.]' (*People v. Neal* (2018) 29 Cal.App.5th 820, 827.) [¶] These additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay." (*Duenas*, *supra*, 30 Cal.App.5th at p. 1168.) The appellate court reversed the trial court's order imposing the court facilities assessment and court operations assessment, and directed it to stay the execution of the restitution fine unless and until the People proved that Dueñas had the present ability to pay it. (*Id*. at p. 1173.)

The *Dueñas* court concluded that due process requires trial courts to determine a defendant's ability to pay before it may impose the assessments mandated by section 1465.8 and Government Code section 70373, and requires trial courts to stay execution of any restitution fine imposed under section 1202.4 until it has been determined that the defendant has the ability to pay the fine. These conclusions were not necessary to the resolution of the case, as the trial court had granted Dueñas's request for a hearing to determine her ability to pay the fine and assessments, and held the hearing before they were imposed. (See *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 443, quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["'[a]n appellate decision is not authority for everything said in the court's opinion but only "for the points

actually involved and actually decided"""].) In the wake of *Dueñas*, these conclusions have spurred numerous defendants to challenge imposition of fines, fees, and assessments in the absence of an ability to pay hearing, even where the defendant did not request a hearing and the record bears no indication that waiver of these fines, fees, and assessments would be appropriate.

The harm that caused Dueñas's situation to rise to the level of a constitutional violation was the application of the statutes imposing fines, fees, and assessments, in the face of undisputed evidence that she was unable to pay and would undoubtedly suffer penalties based solely on her indigence. There is no similar harm suffered by the many defendants who are able to bear these costs without enduring additional penalties, and we cannot conclude that the constitution requires extending the concepts expressed in *Dueñas* to afford all defendants an ability to pay hearing regardless of whether there is evidence that waiver of fines, fees, and assessments may be warranted.

The factual differences between the instant case and *Dueñas* are considerable. In contrast to Dueñas, Jimenez did not contest the assessments and fines imposed upon him. The record contains no evidence of his indigence. That he was represented in the trial court and on appeal by appointed counsel does not demonstrate an inability to pay the assessments or the restitution fine. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 ["a defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have

the 'ability to pay' a restitution fine"].) There is no evidence indicating that Jimenez will be subject to additional penalties based upon his inability to pay the assessments and fee. To the contrary, Jimenez's extensive term in prison will afford him the opportunity to earn prison wages over a significant number of years. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's ability to obtain prison wages].) The additional punishment that Dueñas faced on the basis of her poverty formed the entire basis for the court's opinion in that case, whereas Jimenez has not been penalized as a result of poverty or even demonstrated a potential of future penalization due to impoverishment. Because Jimenez's case lacks the hallmarks that defined *Dueñas*, we decline to apply its reasoning to the facts before us.

DISPOSITION

We remand for the limited purpose of permitting the trial court to consider exercising its discretion to strike the five-year enhancement imposed under section 667, subdivision (a)(1), pursuant to recently enacted Senate Bill 1393. In all other respects the judgment is affirmed.

MOOR, J.

WE CONCUR:

BAKER, Acting P. J.

KIM, J.